88-1012

No. 88-

Supreme Court, U.S.
FILED
DEC 15 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

GULSHAN B. SINGH, M.D. and DALJIT SINGH, INDIVIDUALLY AND AS TRUSTEES FOR THE GULSHAN B. SINGH, M.D., P.A. PROFIT SHARING PLAN, DEFINED BENEFIT PENSION PLAN AND MONEY PURCHASE PENSION PLAN,

Petitioners,

vs.

DREXEL BURNHAM LAMBERT INCORPORATED, DAVID PINES and GREGORY YANKWITT,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

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QUESTION PRESENTED

Whether claims brought under Section 12(2) of the Securities Act of 1933 are subject to predispute arbitration agreements?

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No. 88-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

GULSHAN B. SINGH, M.D. and DALJIT SINGH, INDIVIDUALLY AND AS TRUSTEES FOR THE GULSHAN B. SINGH, M.D., P.A. PROFIT SHARING PLAN, DEFINED BENEFIT PENSION PLAN AND MONEY PURCHASE PENSION PLAN,

Petitioners,

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DREXEL BURNHAM LAMBERT INCORPORATED, DAVID PINES and GREGORY YANKWITT,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

OPINIONS BELOW

The Order of the trial court is reprinted in the Appendix as Al. The decision of the Florida Fourth District Court of Appeal and that Court's subsequent order denying a Motion for Rehearing are reprinted in the Appendix as A2 and A3, respectively. The Order of the Supreme Court of Florida dismissing a Petition for Review is reprinted in the Appendix as A4.

JURISDICTION

The decision of the Florida Fourth District Court of Appeal was entered on August 10, 1988 and the denial of the Motion for Rehearing was entered on September 14, 1988. A petition for review by certiorari to the Supreme Court of Florida was dismissed for lack of jurisdiction on October 21, 1988. This Petition for a Writ of Certiorari was filed within ninety (90) days of either September 14, 1988 or October 21, 1988. This Court has jurisdiction pursuant to 28 U.S.C. §1257(3) or 28 U.S.C. §1257(a).

STATUTES INVOLVED

Section 14 of the Securities Act of 1933, 15 U.S.C. §77n, provides in pertinent part that:

> Any condition, stipulation or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void.

Section 12(2) of the Securities Act of 1933, 15 U.S.C. §771(2), provides in pertinent part that:

> Any person who—
>
> * * *
>
> (2) offers or sells a security (whether or not exempted by the provisions of section 77c of this title, other than paragraph (2) of subsection (a) of said section), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact in order to make the statements, in the light of the circumstances under which they were

> made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission,
>
> shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction...

The United States Arbitration Act, 9 U.S.C. §2, provides in pertinent part that:

> ...an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction or refusal shall be valid, irrevocable, and enforceable save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT OF THE CASE

Petitioners, Gulshan B. Singh and Daljit Singh (hereinafter the "Singhs"), at all times mentioned herein, were husband and wife and also served as trustees for the Gulshan B. Singh, M.D., P.A. Profit Sharing Plan, Defined Benefit Pension Plan and Money Purchase Pension Plan (hereinafter collectively the "Plans").

The Singhs' investment objectives, both as individuals and as trustees of the Plans, were safety of principal and long term growth. Respondent, Gregory Yankwitt (hereinafter "Yankwitt") served as the Singhs' account executive/customer representative at Dean Witter Reynolds, Inc. When Yankwitt left Dean Witter to join Respondent, Drexel Burnham Lambert Incorporated (hereinafter "Drexel"), he prevailed on the Singhs to move their accounts to that firm. At the time the accounts were opened at Drexzl, the Singhs signed various agreements, the most recent of which contained the following arbitration clause:

> Any controversy between you and the undersigned arising out of said account or relating to the contract or the breach thereof, shall be settled by arbitration in accordance with the rules, then obtaining, of the American Arbitration Association, the New York Stock Exchange, Inc. or the National Association of Securities Dealers, Inc., as the undersigned may elect.

Thereafter, utilizing the relationship of confidence and trust he had developed, Yankwitt made fraudulent misrepresentations and omissions to the Singhs to induce them to invest in an options trading program that was totally contrary to their investment objectives, which program resulted in substantial losses to their accounts.

The Singhs filed suit against Drexel, Yankwitt and David Pines, the Branch Office Manager at Drexel (hereinafter collectively "Defendants") in the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida, alleging violations of Section 12(2) of the Securities Act of 1933 and 18 U.S.C. §1962 (hereinafter "Federal RICO").

Upon Petition of the Defendants, the suit was removed to the United States District Court for the Southern District of Florida. Defendants filed an "Answer and Affirmative Defenses" and thereafter filed a "Motion to Stay Action and Compel Arbitration".

In response, the Singhs filed their "Reply Memorandum in Opposition to Defendants' Motion to Stay Action and Compel Arbitration". Without ruling on the Motion to Compel Arbitration, the United States District Court remanded the action to state court.

After remand, Defendants filed a "Renewed Motion to Stay Action and Compel Arbitration". The Defendants argued in their Motion that, in the recent decision of *Shearson/American Express, Inc. v. McMahon*, 482 U.S. _____ , 107 S.Ct. 2332, 96 L.Ed.2d 185 (1987), the Supreme Court had effectively overruled *Wilko v. Swan*, 346 U.S. 427 (1953), and that the trial court should compel arbitration of the Singhs' claims under Section 12(2) of the Securities Act of 1933. In response, the Singhs

filed a "Reply Memorandum in Opposition to Defendants' Renewed Motion to Stay Action and Compel Arbitration".

On October 17, 1987, after oral argument, the trial court granted Defendants' Motion and entered its Order compelling arbitration of both the federal RICO and the Section 12(2) claims. Based on the *McMahon* decision, the Singhs conceded the arbitrability of the Federal RICO claim.

Thereafter, the Singhs appealed the Order of the trial court to the Florida Fourth District Court of Appeal. In their Briefs on Appeal, the Singhs argued that the Supreme Court's decision in *McMahon* dealt with claims under Section 10(b) of the Exchange Act of 1934 and did not overrule the Court's earlier decision in *Wilko v. Swan*, holding that claims arising under Section 12(2) of the Securities Act of 1933 are not subject to predispute arbitration agreements.

On August 10, 1988, the Fourth District Court of Appeal affirmed the order of the tril court compelling arbitration, citing McMahon. Rehearing was denied on September 13, 1987 and a Petition for Review to the Supreme Court of Florida was dismissed for lack of jurisdiction on October 21, 1988.

REASONS FOR GRANTING THE WRIT

1. The decision of the Florida Fourth District Court of Appeal conflicts with the Supreme Court's decision in *Wilko v. Swan*, 346 U.S. 427 (1953), which held that claims under section 12(2) of the Securities Act of 1933 are not subject to arbitration pursuant to predispute arbitration agreements.

The Fourth District's reliance on *Shearson/American Express, Inc. v. McMahon*, 482 U.S.____, 107 S.Ct. 2332, 96 L.Ed.2d 185 (1987), in affirming the trial court's order compelling arbitration of the 12(2) claims, is misplaced. The *McMahon* holding involved claims under Section 10(b) of the Exchange Act of 1934 and, on the grounds of *stare decisis*, the Supreme Court there expressly declined to reverse its holding in *Wilko* that claims under Section 12(2) of the Securities Act of 1933 are subject to predispute arbitration agreements.

The other decisions cited by the Fourth District as authority for its affirmance emanate from lower federal courts that also construed *McMahon* as overruling *Wilko*.

2. On November 14, 1988, this Court granted a petition for a writ of certiorari in the case of *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 845 F.2d 1296 (5th Cir. 1988), *cert. granted*, 57 U.S.L.W. 3343 (U.S. Nov. 15, 1988)(No. 88-385). The basic question presented in that petition, to wit: "Are claims under Section 12(2) of the 1933 Securities Act now arbitrable under predispute broker contracts?" is identical to the question presented in this case.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Counsel of Record
Attorney for Petitioners

APPENDIX

IN THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO. 86-16132 CS
Paul M. Marko III, Circuit Judge

GULSHAN B. SINGH, M.D. and DALJIT SINGH, INDIVIDUALLY AND AS TRUSTEES FOR THE GULSHAN B. SINGH, M.D., P.A. PROFIT SHARING PLAN, DEFINED BENEFIT PENSION PLAN AND MONEY PURCHASE PENSION PLAN,

Petitioners,

vs.

DREXEL BURNHAM LAMBERT INCORPORATED, DAVID PINES and GREGORY YANKWITT,

Respondents.

ORDER

THIS CAUSE having come on to be heard on Defendants' Motion to Stay Action and Compel Arbitration and the Court having heard argument of counsel, and being otherwise advised in the Premises, it is hereupon,

ORDERED AND ADJUDGED that said Motion be, and same is hereby GRANTED.

DONE AND ORDERED in Chambers, at Fort Lauderdale, Broward County, Florida, this 27th day of October, 1987.

/s/PAUL M. MARKO III
Circuit Judge

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA FOURTH DISTRICT

CASE NO. 87-2963

GULSHAN B. SINGH, M.D. and DALJIT SINGH,

Appellants

vs.

DREXEL BURNHAM LAMBERT INCORPORATED, DAVID PINES and GREGORY YANKWITT,

Appellees.

OPINION FILED AUGUST 10, 1988

NOT FINAL UNTIL TIME EXPIRES TO FILE
REHEARING MOTION AND, IF FILED, DISPOSED OF

Appeal of a non-final order from the Circuit Court for Broward County; Paul M. Marko III, Judge

Michael R. Casey
Fort Lauderdale, for Appellants

Lloyd R. Schwed of Fowler, White, Burnett, Hurley, Banick & Strickroot, P.A., Miami, for Appellees

PER CURIAM.

AFFIRMED on the authority of *Shearson/American Express, Inc. v. McMahon*, 482 U.S._____ , 107 S.Ct. 2332, 96 L. Ed.2d 185 (1987); *Kavouras v. Visual Products Systems, Inc.*, 680 F.Supp. 205, 207-08 (W.D. Pa. 1988); *Aronson v. Dean Witter Reynolds, Inc.*, 675 F.Supp. 1324, 1326 (S.D. Fla. 1987); *Staiman v. Merrill Lynch, Pearce, Fenner & Smith*, 673 F.Supp. 1009, 1011 (C.D. Cal. 1987).

LETTS, DELL and WALDEN, JJ., concur.

IN THE DISTRICT COURT OF APPEAL OF
THE STATE OF FLORIDA FOURTH DISTRICT

CASE NO. 87-2963

GULSHAN B. SINGH, M.D. and DALJIT SINGH,

Appellants,

vs.

DREXEL BURNHAM LAMBERT INCORPORATED,
DAVID PINES and GREGORY YANKWIT,

Appellees.

September 14, 1988

BY ORDER OF THE COURT:

ORDERED that Appellants' August 22, 1988 Motion for Rehearing is denied.

I hereby certify the foregoing is a
true copy of the original court order.

/s/CLYDE L. HEATH,
Clerk

cc: Kathleen Molchan, Esq.
Lloyd R. Schwed, Esq.

SUPREME COURT OF FLORIDA

FRIDAY, OCTOBER 21, 1988

CASE NO. 73,182

DISTRICT COURT OF
FOURTH DISTRICT - NO. 87-2963

GULSHAN B. SINGH, M.D. and DALJIT SINGH,

Petitioners,

vs.

DREXEL BURNHAM LAMBERT INCORPORATED,
DAVID PINES and GREGORY YANKWIT,

Respondents.

It appearing to the Court that it is without jurisdiction,the Petition for Review is hereby dismissed. *Dodi Publishing Co. v. Editorial America, S.A.*, 385 So.2d 1369 (Fla. 1980).
A TRUE COPY

TEST:

Sid J. White
Clerk, Supreme Court

cc: Hon. Clyde L. Heath, Clerk
Hon. Robert E. Lockwood, Clerk
Hon. Paul M. Marko III, Judge

(seal) Supreme Court of the
State of Florida

Michael R. Casey, Esquire
Lloyd R. Schwed, Esquire

/s/Phyllis Bamburg
Deputy Clerk

Supreme Court, U.S.
FILED
MAR 3 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1012

In The

Supreme Court of the United States

October Term, 1988

GULSHAN B. SINGH, M.D. and DALJIT SINGH, INDIVIDUALLY AND AS TRUSTEES FOR THE GULSHAN B. SINGH, M.D., P.A. PROFIT SHARING PLAN, DEFINED BENEFIT PENSION PLAN AND MONEY PURCHASE PENSION PLAN,

Petitioners,

vs.

DREXEL BURNHAM LAMBERT INCORPORATED, DAVID PINES and GREGORY YANKWITT,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the decision of the Florida Court of Appeal – that claims asserted under § 12(2) of the Securities Act of 1933, 15 U.S.C. § 77l(2) (1982), are arbitrable – conflicts with *Wilko v. Swan*, 346 U.S. 427, 74 S.Ct. 182 (1953), in the wake of *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 107 S.Ct. 2332 (1987)?

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Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 107 S.Ct. 2332 (1987) ..... i, 1, 2, 3

Wilko v. Swan, 346 U.S. 427, 74 S.Ct. 182 (1953) ..i, 2, 3

STATEMENT OF THE CASE

Petitioners filed a two-count Complaint in state court against Drexel Burnham Lambert, Inc. ("Drexel Burnham") and its two employees, David Pines and Gregory Yankwitt, alleging violations of Section 12(2) of the Securities Act of 1933 and 18 U.S.C. § 1962 ("RICO"). Petitioners alleged misrepresentations and omissions in connection with investment accounts Petitioners opened at Drexel Burnham.

At the time Petitioners opened their accounts at Drexel Burnham, Petitioners executed written customer agreements in which they agreed to arbitrate "any controversy" arising out of their account. One of the agreements signed by Petitioners provided the following:

> Any controversy between you and the undersigned arising out of said contract or relating to this contract or the breach thereof, shall be settled by arbitration in accordance with the rules, then obtaining, of the American Arbitration Association, the New York Stock Exchange, Inc., or the National Association of Securities Dealers, Inc., as the undersigned may elect.

Drexel Burnham filed a motion to compel arbitration of the dispute pursuant to the Federal Arbitration Act, 9 U.S.C. § 2 et seq. (1982). On October 27, 1987, the state court granted the motion to compel arbitration based on this Court's decision in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 107 S.Ct. 2332 (1987).

The trial court's order was affirmed by Florida's Fourth District Court of Appeal on August 10, 1988. The Florida Supreme Court denied a petition to invoke discretionary jurisdiction on October 21, 1988. This petition for writ of certiorari followed.

Petitioners take the position that the decision of the Florida court conflicts with the Supreme Court's decision in *Wilko v. Swan*, 346 U.S. 427, 74 S.Ct. 182 (1953). Petitioners further assert that certiorari jurisdiction is appropriate because the Supreme Court has already granted certiorari on the identical issue in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 845 F.2d 1296 (5th Cir. 1988), *cert. granted*, 57 U.S.L.W. 3343 (U.S. Nov. 15, 1988) (No. 88-385).

To the extent that Petitioners seek review to resolve the conflict that exists between various federal and state courts, Drexel Burnham agrees that a decision by the Supreme Court is appropriate to provide uniformity throughout the nation on the issue of whether Section 12(2) claims are presently arbitrable in light of *McMahon*. However, Drexel Burnham also maintains that (1) in this instance no conflict exists with *Wilko* in light of *McMahon* and (2) certiorari review in this case is unnecessary and duplicative since the *Rodriguez* case is legally and factually identical.[1]

---

[1] The *Rodriguez* case is slightly different from a procedural standpoint because *Rodriguez* involves a petition for writ of certiorari to the U.S. Fifth Circuit Court of Appeals, as opposed to a state appellate court in this case. However, in substantive terms, the two cases present the identical legal issue.

REASONS FOR DENYING THE WRIT

First, Drexel Burnham asserts that the decision of Florida's Fourth District Court does not conflict with *Wilko, supra,* in view of the Supreme Court's analysis of *Wilko* in *McMahon*. More specifically, this Court in *McMahon* effectively overruled *Wilko* because "most of the reasons given in *Wilko* have been rejected subsequently by the Court as a basis for holding claims to be nonarbitrable." 107 S.Ct. at 2340. Therefore, no conflict is presented in this case and the Court could properly deny the petition for writ of certiorari.

Second, this Court granted certiorari in *Rodriguez* on the issue of whether claims under Section 12(2) of the Securities Act of 1933 are arbitrable in light of the *McMahon* decision. The parties have completed briefing in the *Rodriguez* case and oral argument is scheduled for March 27. Without question, the Court's decision in *Rodriguez* will be dispositive of this case.

Drexel Burnham has reviewed the brief submitted by the Respondent in *Rodriguez* and believes that all significant legal issues have been addressed in a thorough and effective manner. Therefore, Drexel Burnham respectfully submits that granting certiorari in this case will not benefit the Court or the parties herein. To the contrary, Drexel Burnham suggests that granting certiorari would be inefficient and would waste the Court's precious resources.

CONCLUSION

For all the foregoing reasons, Respondents respectfully request that the Court deny the petition for writ of certiorari.

Dated: Miami, Florida
March 2, 1989

Respectfully submitted,

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